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No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION AND SUMMARY

Section 1782 was enacted to enable U.S. courts to assist foreign tribunals by removing jurisdictional barriers to discovery for use in the proceedings of those tribunals. Congress did not design this statute to create new discovery rights that would be unavailable both (i) in the foreign jurisdiction if the evidence, like the proceeding for which it is sought, were there rather than here and (ii) in this country if the predicate "proceeding" were here rather than there. As we and the European Commission have observed, construing section 1782 to subvert both foreign and domestic discovery norms in this manner would make nonsense of the comity purposes underlying this statute. That point is fatal to AMD's position, because it is undisputed that AMD would have no right to the discovery it seeks either (i) if the evidence in question were in Europe rather than the United States or (ii) if AMD had filed its antitrust complaint with U.S. authorities rather than with the EC.

AMD nonetheless asserts discovery rights on the ground that "the statute's *real* policy" is to "provid[e] broad discovery for use in proceedings [of] foreign jurisdictions, to encourage those jurisdictions to provide broad discovery for American tribunals and parties." AMD Br. 29 n.10. This is wrong on two levels. First, the purpose of section 1782 is comity, not "broad discovery" for its own sake. Comity requires the jurisdiction *from* which discovery is sought to honor the discovery policies of the jurisdiction *for* which it is sought, whether those policies are permissive or restrictive. In any event, even if Congress had designed section 1782 to serve as a model of expansive American-style discovery for foreign jurisdictions to follow, granting the discovery sought here could not serve that purpose either, because, as noted, no one disputes that even U.S. law would preclude such private-party discovery in connection with any analogous investigation in this country.

At bottom, AMD is left to argue that section 1782 opens a giant loophole that entitles private complainants to other-

wise universally unavailable pre-litigation civil discovery if, and only if, an investigation is pending in a foreign jurisdiction but the evidence happens to be in the United States. The text of section 1782 cannot plausibly be read to permit that absurd result, which would thwart the very comity goals on which the statute is based. At a minimum, the scope of section 1782 is ambiguous. That ambiguity is properly resolved by reference to the provision's title and legislative history, each of which confirms that the scope of beneficiaries excludes private non-litigants.

Ultimately, moreover, AMD's various arguments about the outer textual limits of section 1782 are irrelevant to the relief it seeks. Like other procedural statutes, section 1782 is subject to the development of general rules of practice designed to identify the recurring fact patterns in which a grant of discovery would either promote or harm the statutory objectives. Even AMD concedes that, because the statute speaks in terms of what the district courts "may" order, those courts have broad discretion to deny discovery requests that fall within the textual ambit of section 1782. The problem for AMD is that no one *except* AMD seriously suggests that granting AMD the discovery it seeks would be appropriate under these circumstances. The United States submits that "the particular characteristics of the request in this case weigh against granting the requested discovery[.]" U.S. Br. in Supp. of Cert. 18. Professor Hans Smit, whose post-enactment scholarship features prominently in AMD's brief although it does not qualify even as legislative history, has made clear that section 1782 discovery should be denied in precisely these circumstances—because, for example, the EC has jurisdiction over Intel and could force it to produce this discovery directly. And the EC itself devotes two briefs to why civil discovery by private non-litigants would be categorically inappropriate.

AMD accuses the EC of "put[ting] unnecessary roadblocks in the way of [AMD's] effort to seek the truth" and concludes that "the more it appears that the EC will seek to block or ignore such evidence, the more valuable that evi-

dence would be to the [European] Community courts overseeing the EC, and thus the more important it would be to grant AMD's discovery request." AMD Br. 20, 49. This position is as unsound as it is insensitive to the interests of the foreign sovereign for whose ostensible benefit AMD seeks this discovery. At bottom, AMD is asking this Court to usurp the role of the European courts and do what (by AMD's own account) those courts are unlikely to do: reverse the EC's prosecutorial judgments about what evidence to obtain in its antitrust investigations. But concerns about a foreign sovereign's compliance with its own law in its own forums can and should be addressed to the courts of *that* sovereign, not to the courts of this country.

In short, viewed from the perspective of whether discovery should ultimately be granted or denied, this is an easy case. But this Court can and should do more than simply remand to the lower courts in the expectation that they will agree that AMD has no plausible basis for discovery, given the considerations noted above. The Court should instead bring much-needed clarity to this area of law by adopting that conclusion itself—either as a matter of statutory construction or as a rule of practice.

ARGUMENT

I. THE TEXT, PURPOSE, AND HISTORY OF SECTION 1782 CONFIRM THAT CONGRESS DID NOT WISH TO CREATE NEW FORMS OF OTHERWISE UNAVAILABLE DISCOVERY.

1. AMD's brief is as notable for what it does not argue as for what it does. First, AMD does not deny that, if it had filed its antitrust complaint with U.S. antitrust authorities rather than with the EC, it would have no right to the documents it seeks here, for the familiar reason that U.S. law generally denies discovery rights to civil non-litigants. *See* Intel Br. 19-20. Second, AMD does not deny that EC law embodies a similar rule and that AMD would have no right to these documents if they were physically in Europe. The EC and the courts of the European Community have emphasized the importance of applying this no-discovery rule to the Commission's antitrust investigations, in part to

keep those investigations non-adversarial and to deter companies from filing complaints against their rivals as a pretext for document trawling. *See* Intel Br. 22-23, EC Br. 11-16. Third, AMD does not deny that the EC is perfectly capable of ordering Intel—as a party within its jurisdiction—to produce those documents on its own, without the assistance of U.S. law, and that the Commission has chosen not to do so.[1]

AMD compartmentalizes the issues in this case by separately analyzing whether section 1782 permits civil discovery (i) when such discovery would be barred by the foreign sovereign (AMD Br. 26-34), (ii) when the "litigation" for which it is ostensibly taken is neither pending nor imminent (*id.* at 34-39), or (iii) when it is requested by private non-litigants (*id.* at 39-41). As the issues arise in this case, however, these are just three ways of asking the same question. The reason AMD is a non-litigant is that no litigation is pending.[2] And the reason AMD could never obtain the dis-

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[1] AMD speculates that the EC declined to request the documents "perhaps because it lacked the resources to conduct a review of them" (AMD Br. 1) and that the discovery "could be of significant value . . . to the EC" (*id.* at 19). These statements are wholly without basis, and they fly in the face of the EC's own explanation that it does not "consider it necessary to request or even subsequently to review the documents" sought here. EC Br. in Supp. of Cert. 4.

[2] In its brief in opposition to certiorari, AMD acquiesced in Intel's observation that—as the Ninth Circuit itself had assumed (*see* Pet. 12, Pet. App. 6a)—the present first-phase investigation is not itself a "proceeding" before a "tribunal." AMD argued instead only that discovery is warranted under section 1782 if it could be used for a *future* adjudicative proceeding. *See* AMD Br. in Opp. to Cert. 16-19; *see also* Intel Reply Br. in Supp. of Cert. 3-4 (noting AMD's acquiescence); AMD Supp. Br. in Supp. of Cert. 4 (encouraging Court to grant certiorari and arguing, on the merits, that "no matter what the Commission in this case ultimately decides, the evidence AMD seeks to submit *will* be 'use[d]' in a 'proceeding' before a 'foreign tribunal'") (emphasis in original). AMD's acquiescence on this point was plainly material to the Court's certiorari decision, for otherwise this case would not present an opportunity to resolve the conflict between the Second and Ninth Circuits on whether a foreign proceeding must be at least "imminent" before a court may order section 1782 discovery. In the back pages of its brief (at 45-46), AMD now suggests for the first time that perhaps the current first-phase investigation may consti-

covery it seeks in the EC is similar to the reason it could not obtain such discovery in the United States had it filed its complaint with U.S. antitrust authorities instead: While government officials routinely take pre-litigation *criminal* discovery both here and abroad, U.S. law and EC law (as well as the law of virtually all other jurisdictions) preclude private non-litigants from obtaining *civil* discovery except in very limited circumstances that AMD does not invoke here. *See* Intel Br. 19-20 n.10. At bottom, the unitary question in this case is whether section 1782 opens an enormous loophole entitling civil non-litigants to otherwise *universally unavailable* discovery if they file their antitrust complaint in a foreign jurisdiction and the documents or persons at issue happen to be in the United States.

As we explain in our opening brief, reading section 1782 to create that loophole is absurd: Congress enacted that provision to reduce, not increase, the significance of geography in litigation with international aspects. AMD's only response is that "the statute's *real* policy" is not to remove jurisdictional barriers to the production of otherwise discoverable evidence, but to expand the scope of discovery *as such*, "to encourage [foreign] jurisdictions to provide broad discovery for American tribunals and parties." AMD Br. 29 n.10. This is untenable. The objective of section 1782 is not "broad discovery" for its own sake, but comity. And comity means that the tribunal from which discovery is sought should pay due respect to the discovery policies of the tribunal for which it is sought—whether those policies are broad or narrow. Intel's position, like AMD's, would thus "encourage" foreign jurisdictions to cooperate with U.S. courts and

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tute a "proceeding" before a "tribunal" after all. Any such argument is waived, for respondents were required "to point out in the brief in opposition, and not later, any perceived misstatement made in the petition," and defaulting on that obligation waives "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15.2. In all events, the argument is frivolous on the merits for the reasons discussed in our opening brief (at 11, 28) and in the EC's brief on the merits (at 5-11).

litigants in providing discovery as broad as could be obtained under U.S. discovery principles. The difference is that Intel's position, unlike AMD's, recognizes the great affirmative value that many sovereigns place on enforcing prudent limitations on discovery. Intel's position honors those limitations; AMD's position would thwart them.

AMD thus falls back on the argument that the "purposes of § 1782 are largely beside the point" because, even if they support Intel's position, they are not reflected in "the unambiguous text." AMD Br. 28. But even AMD does not argue that the statutory language should be understood to generate open-ended discovery rights to the limits of textual interpretation. It concedes, for example, that the statute does not confer such rights on all non-litigants whenever they claim a need to take discovery "for use" in some speculative future proceeding. AMD submits instead that courts should inquire into whether such a "proceeding" is "'in reasonable contemplation.'" AMD Br. 38 (quoting *In re Letter of Request from Crown Prosecution Serv. of U.K.*, 870 F.2d 686, 687 (D.C. Cir. 1989)). But the "reasonable contemplation" standard appears nowhere in the statute, and there is no textual (or other) reason to prefer it to the Second Circuit's "imminence" standard. *See* Intel Br. 31-33. And the latter standard would sensibly bar discovery where, as here, there might never *be* a "proceeding" in which the discovery might be "use[d]"—because, for example, the complainant and investigatory subject may settle their differences privately or because the company dissatisfied with the EC's ultimate decision may elect not to appeal it.

Similar indeterminacy accompanies the statutory phrase "interested person." Here, too, AMD does not claim that the term should be inflexibly applied to its fullest literal meaning. That approach would imply, among many other things, that the target of a foreign criminal inquiry could *himself* invoke that investigation as a basis under section 1782 for seeking potentially exculpatory evidence in the files of private third parties long before criminal charges are filed. As in other contexts, where "'uncritical literalism'" in

interpreting a statute "offer[s] scant utility in determining Congress' intent as to the extent" of that statute, it is necessary to look to "'the objectives of the . . . statute as a guide to [its] scope.'" *California Div. of Labor Standards Enforcement* v. *Dillingham Constr. N.A.*, 519 U.S. 316, 325 (1997) (quoting *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)). Just as it would defy the comity objectives of section 1782 to use it as a basis for entitling criminal suspects to otherwise unavailable pre-charge criminal discovery, so too would it thwart those objectives to use the statute as a basis for entitling private non-litigants to otherwise unavailable pre-litigation civil discovery.

At a minimum, the scope of section 1782 is ambiguous, and this Court should consult the legislative history and the statutory title—"[a]ssistance to foreign and international tribunals and to litigants before such tribunals"—for further guidance. *See, e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("the title of a statute . . . [is a] tool[] available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted). Each confirms that Congress enacted section 1782 simply to assist the customary beneficiaries of compelled discovery in virtually any legal system: (i) sovereigns, tribunals, and their agents and (ii) actual litigants. Indeed, these are the only statutory beneficiaries ever mentioned in the numerous passages of legislative history addressing the scope of section 1782. *See* Intel Br. 26 & n.14.

AMD contends that Congress must have intended to confer discovery rights on unprecedented new classes of beneficiaries beyond these, relying again on Congress's use of the term "any interested person" to describe who may apply for discovery under section 1782. As we observed in our opening brief, however, Congress used the same term in a companion provision also enacted in 1964: 28 U.S.C. § 1696. That provision, which authorizes "any interested person" to apply for an order effecting "service" on a party in the United States, can apply *only* in connection with liti-

gation and can thus be invoked only by foreign tribunals or litigants. AMD makes no effort to square its argument with this embarrassing provision, and the United States consigns its own response to a footnote. *See* U.S. Merits Br. 20 n.11. Tellingly, the United States cannot cite a single real-world example to support the notion that section 1696 could conceivably apply outside the litigation context. That is no surprise because, as its title indicates, the purpose of section 1696 is to facilitate "[s]ervice in foreign . . . litigation" and, as the text further confirms, the provision can apply only "in connection with a proceeding in a foreign or international tribunal."[3]

The legislative history likewise demonstrates that Congress chose the term "interested person" in section 1782 merely to encompass the types of individuals who, in addition to litigants, enjoy traditional discovery rights both here and abroad: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3789 (emphasis added); *see In re Request*

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[3] AMD (but, notably, not the United States) claims that our position "would place § 1782 into conflict" with the Hague Evidence Convention (28 U.S.C. § 1781 note)—which, AMD suggests, contains an obscure negative implication that foreign "judicial authorit[ies]" might sometimes be able obtain discovery in the United States in "contemplat[ion]" of "judicial proceedings." AMD Br. 43 n.18. This argument lacks merit. First, there is nothing for any interpretation of section 1782 to "conflict" with, because the Convention "does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures." *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987). Also, even if the Convention specified mandatory rules, and even if AMD's strained construction of the Convention were correct, that construction would comport with our position because, again, it is commonplace for "judicial authorities" to obtain evidence in contemplation of future "judicial proceedings" in the criminal context.

for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1154 (11th Cir. 1988). AMD claims that, by including the words "such as" in this passage, Congress signaled an otherwise concealed intent to create, through section 1782, new categories of discovery that would be unavailable to private non-litigants in any other context. AMD Br. 40. This is implausible. If those words come freighted with any significance at all, they mean only that section 1782 removes barriers to the production of evidence to sovereigns, officials, and litigants that would *have* discovery rights but for international jurisdictional obstacles. Neither in this nor in any other passage does the legislative history reveal any intent to confer new discovery rights on private parties that would otherwise lack them everywhere.

AMD's contrary position would also drain significance from the 1996 amendment, which provides that the set of foreign "proceedings" for which section 1782 allows discovery "includ[es] criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486 (1996); *see* Intel Br. 9, 25, 31. That clause would serve little purpose if, as AMD maintains, the rest of section 1782 were properly construed to permit pre-litigation discovery of all kinds, including the civil discovery sought here by a private party. Although AMD claims that the word "including" merely "introduce[s] an *example* of what the statute covers," AMD Br. 43-44, that point does not explain why Congress might have gone to the trouble of adding such surplusage to a supposedly clear statute. And the fact that Congress used the word "including" at the beginning of this new clause is at least as consistent with our position as with AMD's. Criminal investigations are the most obvious setting in which section 1782 allows discovery in the United States of evidence that would otherwise be available to government officials in the foreign jurisdiction, because pre-litigation criminal discovery is an international norm. By "including" such investigations within the broader scope of section 1782, Congress held open the possibility that foreign authorities could invoke the statute to obtain pre-litigation

discovery in civil law enforcement contexts as well if, as in the criminal context, such discovery would also be available to those authorities if it were within their jurisdiction. *See* Intel Br. 25 (discussing case law). But Congress did not signal any intent to create a new species of ubiquitously *unavailable* discovery for private non-litigants.[4]

There is likewise no merit to AMD's claim (Br. 42) that *Intel* has disregarded the significance of section 1782's evolution over time, including Congress's decision to provide discovery for the benefit of "tribunals" rather than just "courts" and the omission of the word "pending" in the completely rewritten version of the statute adopted in 1964. The sequence of statutory changes *does* show that Congress wished to accommodate requests by "investigating magistrates" (and similar officials and institutions) for *criminal* discovery before formal charges have been filed. *See* Intel Br. 5-9 & n.4. Again, however, Congress was simply removing jurisdictional barriers to the types of discovery that are routine both in the United States and abroad. Whereas pre-litigation criminal discovery is the norm around the world, civil discovery by private non-litigants is virtually unheard of. Nothing in these amendments suggests that Congress wrote section 1782 to change that convention; quite to the contrary, the 1996 amendment confirms that Congress in-

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[4] As we explain in our opening brief (at 31-32), AMD's position would likewise cast doubt on the significance of 15 U.S.C. § 6203(a), which grants pre-litigation discovery to foreign antitrust authorities *only* "[o]n the application of the Attorney General . . . in accordance with an antitrust mutual assistance agreement." Congress passed this provision in 1994. If section 1782 already entitled private non-litigants like AMD to obtain pre-litigation civil discovery, there would have been little need for section 6203(a), which permits such pre-litigation discovery—but only at the request of a foreign sovereign, with the approval of the Attorney General, and pursuant to a bilateral agreement. AMD suggests (Br. 44 n.19) that "American authorities may be more effective in obtaining evidence from American courts under § 6203(a)," but that is no answer. As the United States observes (*see* U.S. Merits Br. 1), foreign governments often enlist the aid of federal authorities in obtaining discovery under section 1782 itself, and a separate statute was unnecessary for that purpose.

tended to preserve it. AMD has no genuine response to this point.

2. AMD's extensive reliance on the pronouncements of Professor Hans Smit is as surprising as it is unavailing. As an initial matter, academic commentary is rarely advanced so aggressively as purported evidence of congressional intent, even when that commentary is written by a layperson who once played a role in the legislative process. The Second Circuit has thus correctly declined to "accept [Smit's] commentary as persuasive evidence of the meaning of the statute that Congress ultimately enacted" because, after all, "[s]taff members have ample opportunity to draft language that members of Congress may choose to use in committee reports and statutory text, but they may not elucidate congressional intent by bearing witness to congressional thinking." *In re Request for Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991).

AMD's emphasis on Professor's Smit's section 1782 commentary is surprising for a second reason as well: Smit has himself explained that, on two levels, the precise type of discovery that AMD seeks would be inconsistent with section 1782. First, in Smit's view, section 1782 discovery should be limited to cases in which the person from whom discovery is sought is "a third party, not . . . a party, in the foreign proceedings. For assistance is needed only if the person who is to produce the evidence is not subject to the jurisdiction of the foreign or international tribunal. When that person is a party to the foreign proceedings, the foreign or international tribunal can exercise its own jurisdiction to order production of the evidence." App. 4a (¶ 14).[5] Here, of course, Intel, as the subject of the EC's investigation, is sub-

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[5] Professor Smit made these observations in a sworn declaration he submitted in connection with section 1782 litigation in *In re Ishihara Chem. Co.*, 121 F. Supp. 2d 209 (E.D.N.Y. 2000), *vacated*, 251 F.3d 120 (2d Cir. 2001). We have lodged that declaration with the Clerk of this Court and have reprinted it in the Appendix ("App.") to this brief.

ject to the EC's jurisdiction; the EC would be free to force Intel to turn over the documents at issue; and the EC has simply decided not to do so.

Smit adds in the alternative that, "even if it were assumed that Section 1782 were available to obtain evidence in the United States from a party in the foreign proceedings, a United States court should exercise its clearly prescribed discretion to deny an application made by the opposing party in the foreign proceedings. As a general rule, it would be improper to impose on a United States court a burden that should reasonably be that of the foreign tribunal." App. 5a (¶ 17). That outcome, Smit says, is necessary not just to effectuate Congress's true purpose in enacting section 1782, but also to avoid exposing U.S.-based companies to asymmetrically burdensome discovery obligations vis-à-vis foreign opponents in foreign tribunals. *Id.* (¶ 16). Our point is not to enlist Professor Smit's analysis *in haec verba* to our side of this dispute—the same outcome is more straightforwardly justified on the somewhat different grounds discussed above—but to put an end to AMD's curious supposition that Smit's commentary supports its position.

That commentary undermines AMD's position in an independent respect as well. Professor Smit has opined that, "when a foreign or international tribunal has ruled that production of the evidence pursuant to Section 1782 would not be appropriate, an American court should heed that ruling and deny the application." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 14 (1998). Here, the EC has declined to order production of this precise evidence and has filed two amicus briefs stating that granting AMD discovery under section 1782 would "not be appropriate" (*id.*) because it would conflict with basic EC policy choices designed, among other things, to keep the Commission's antitrust investigations non-adversarial, to protect the integrity of its informal

consultations with private companies, and to preclude strategic behavior in the filing of antitrust complaints.[6]

3. AMD quarrels at length with the EC's policy reasons for opposing private discovery in connection with its investigations, but AMD's arguments on this point are irrelevant, unsound on the merits, and insensitive to the foreign authority for whose use it is supposedly seeking these documents. Compelling discovery for the ostensible benefit of an alleged "tribunal" that resists it would undermine, rather than promote, the comity interests on which section 1782 is based. As the United States recognizes, with considerable understatement, "the European Commission's assertions may provide a substantial basis" for denying discovery now that the EC is "clearly on record, through its amicus curiae briefs in this Court, that Section 1782's provision of judicial assistance may be inimical to its investigations." U.S. Merits Br. 28. And, if there were any doubt about the need to avoid granting discovery against the wishes of the very sovereign on whose behalf the discovery is purportedly sought, it should be resolved by the "strong presumption against any interpretation that undermines international comity." EC Br. 16. This Court has "long recognized the demands of comity in suits involving foreign states . . . as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Societe*

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[6] The considerations discussed in the text would logically lead Professor Smit to favor a denial of discovery here even though he once remarked—in one sentence of a footnote in a law review article—that section 1782 "permits the rendition of *proper* aid in proceedings before the EEC Commission" under Article 19. Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1027 n.73 (1965) (emphasis added), *quoted in* AMD Br. 7, 45. In all events, even if Smit's views on the meaning of section 1782 rose to the level of legislative history, which they do not, his one-sentence remark about the use of that statute in connection with EC investigations would be entitled to no weight, because he provides no analysis of the *characteristics* of such an investigation that are relevant to whether it can serve as basis for section 1782 discovery.

Nationale, 482 U.S. at 546 (citing *Hilton* v. *Guyot*, 159 U.S. 113 (1895)).

AMD criticizes the EC for "put[ting] unnecessary roadblocks in the way of a complainant's effort to seek the truth" (Br. 20) and ultimately falls back on the remarkable claim that "the more it appears that the EC will seek to block or ignore" the evidence AMD requests here, "the more valuable that evidence would be to the Community courts overseeing the EC, and thus the more important it would be to grant AMD's discovery request" (Br. 49). This argument is as implausible as it is brazen. AMD does not argue that the European courts will fault the EC for its decision not to order Intel directly to produce documents that the Commission deems immaterial to its investigation, let alone for the EC's opposition to AMD's efforts to short-circuit that decision through section 1782. To the contrary, AMD claims to need this discovery now precisely *because* it will be "too late" once any appeal is filed to review the EC's decision not to seek the discovery itself. AMD Br. 38. If that is correct, it can only be because the European courts wish to preserve the EC's discretion on discovery issues, and AMD has no business asking U.S. courts to force a contrary outcome on this foreign sovereign. Of course, if European courts *did* recognize a duty by the EC to obtain discovery in these circumstances, there would also be no need for intrusive intervention by U.S. courts, because on remand the EC would obtain the documents from Intel directly. Either way, it would offend basic principles of comity for the U.S. courts to insinuate themselves, at AMD's behest, into the relationship between the EC and the courts of the European Community.

In short, the "conundrum" about which AMD complains (Br. 37), like the "Catch-22" about which it complained at the petition stage (Br. in Opp. to Cert. 20 n.9), is no conundrum at all—and it is the consequence of European law, not of our interpretation of section 1782. The reason AMD has no right to these materials even though they are in the United States is the same reason it would indisputably have no right to these materials if they were in Europe instead: European

law attributes great value to the non-adversarial nature of the EC's investigations and gives the EC broad discretion to compile investigatory records as it sees fit. *See* Intel Br. 23-24; U.S. Br. in Supp. of Cert. 19 n.7. This Court is the wrong forum for the airing of AMD's contrary policy views.

II. THE COURT SHOULD ALTERNATIVELY EXERCISE ITS SUPERVISORY AUTHORITY TO MAKE CLEAR THAT DISCOVERY WOULD BE INAPPROPRIATE HERE.

AMD's position reduces to the claim that nothing in the text or legislative history of section 1782 directly forecloses the type of discovery it seeks. As we have shown, that claim is untrue. But even if it were true, it would not entitle AMD to that discovery. As AMD acknowledges (Br. 30-31), the terms of section 1782 are permissive, not mandatory, and the federal courts have broad discretion to deny discovery that falls within the literal scope of that provision. This Court should make clear that such discretion is properly exercised to deny discovery in either of two circumstances: (i) where a particular type of discovery would be unavailable in the foreign jurisdiction if the evidence were there and would be unavailable in the United States if an analogous investigation or proceeding were pending here or (ii) where the foreign sovereign has expressly opposed the grant of a particular type of discovery for its ostensible benefit.

1. Appellate courts, including this Court, have long played a critical role in developing rules of practice to guide the discretion of lower courts as they confront recurring fact patterns that arise from case to case. "[T]he courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985) (citation omitted); *see also Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to

prescribe rules of evidence and procedure that are binding in those tribunals."). Indeed, this Court has exercised such authority to limit not just procedural rights of the sort at issue here, but also the substantive rights of inmates to seek habeas corpus relief. *See, e.g.*, *Calderon* v. *Thompson*, 523 U.S. 538, 554, 559 (1998) (discussed in Intel Br. 35-36).

AMD nonetheless claims that the courts are powerless to deny its discovery request, reasoning that "[t]he text of § 1782 reflects considered policy judgments by Congress, which has proven itself more than capable of revising § 1782 in response to perceived policy needs." AMD Br. 47. This makes no sense. First, whether or not the text of section 1782 affirmatively forecloses AMD's discovery request, it surely does *not* reflect any "considered policy judgment" to give private parties expansive pre-litigation civil discovery rights that would otherwise be barred under both U.S. law and the law of the relevant foreign jurisdiction. And, although Congress is always "more than capable of revising" procedural and evidentiary statutes such as this one (*id.*), that is no reason for the courts to apply those statutes with senseless liberality in the meantime. If AMD means that courts must adopt a policy of maximal production, ordering whatever discovery might be found consistent with the broadest possible construction of section 1782, that argument runs headlong into AMD's own acknowledgement that the statute "'leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable.'" AMD Br. 30-31 (quoting S. Rep. No. 88-1580, at 7).

Finally, AMD suggests (Br. 47) that U.S. courts should reflexively grant section 1782 applicants as much discovery as possible, without meaningful limiting principles, "given the foundations of § 1782 in the affairs of nations, as to which this Court typically defers strongly to the policy judgments of Congress." But the cases upon which AMD relies—*Haig* v. *Agee*, 453 U.S. 380, 292 (1981), *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965), and *Chicago & Southern Airlines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112 (1948)—deal with the Court's

historic reticence to invalidate the policies of the federal government in "[m]atters intimately related to foreign policy and national security." *Haig*, 453 U.S. at 292. They have nothing to do with the need for the federal courts to develop rules for the sensible application of discovery statutes in recurring factual situations. And the fact that section 1782 involves "the affairs of nations" makes it all the more important for federal courts to heed the views of the foreign sovereign on whose behalf the applicant seeks discovery. As the United States explains, "the Commission's position [in this case] could properly lead United States courts to follow a general rule of declining to provide a form of assistance that the foreign tribunal does not want." U.S. Merits Br. 28.

2. In short, even if AMD's discovery request were not foreclosed by application of the normal tools of statutory construction, it still would be subject to a judicial inquiry into whether granting that request would serve the comity purposes of the statute. For the reasons discussed in our opening brief (and above), granting that request would in fact thwart those goals.

Indeed, outside of AMD's own brief, there is virtual unanimity on that point. The United States observes that "the particular characteristics of the request in this case weigh against granting the requested discovery as a matter of discretion." U.S. Br. in Supp. of Cert. 18. A broad cross-section of the U.S. business community has filed two amicus briefs expressing grave concern that AMD's position, if adopted by this Court, would expose U.S.-based firms to burdensome and potentially one-sided discovery obligations.[7] And, despite AMD's hair-splitting denial of the obvi-

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[7] *See* Br. of the Chamber of Commerce of the United States as Amicus Curiae in Supp. of Petitioner; Br. of the Product Liability Advisory Council, Inc. as Amicus Curiae in Supp. of Petitioner. The views of these two broad-based associations belie AMD's groundless suggestion (Br. 6, 29 n.10) that its expansive interpretation of section 1782 would somehow advance the interests of U.S.-based businesses. And, as we note in Section I.1 above, Intel's position, no less than AMD's, would serve the interests of U.S. companies seeking evidence *abroad* for use in the *United*

ous (*e.g.*, Br. 48), the EC explains at great length in its briefs why granting AMD's discovery request would subvert the comity principles underlying section 1782. In particular, it would "undermine the European Community's carefully balanced policies regarding the disclosure of confidential information," "encourage companies to file pretextual complaints with the Commission solely in order to use Section 1782," "wast[e] the Commission's scarce resources," "jeopardiz[e] the Commission's ability to maintain the confidentiality of documents submitted to it," and "greatly burden the Commission and other foreign sovereigns by requiring them to monitor and appear in district court proceedings throughout the United States in order to explain their interests in blocking such requests." EC Merits Br. 4-5.

Although the United States agrees that "reviewing courts have inherent supervisory authority to formulate rules of 'sound judicial practice'" to ensure national consistency in how district courts address "recurring fact patterns and issues," it nonetheless contends that "the Court should not attempt to develop any such rule at this juncture" and should instead await "the perspective and judgment of the lower courts that have practical experience in applying Section 1782 to specific factual contexts." U.S. Merits Br. 28-30. This reasoning is unsound on three levels. First, the lower courts have already gained considerable "perspective and judgment" in developing the limiting principles required by "practical experience" in dealing with section 1782 discovery issues. That is why the discovery sought here would be denied under the law of the First, Second, Fifth, and Eleventh Circuits. *See* Intel Br. 20-21 & n.11, 25, 30-31. And this Court presumably granted certiorari to resolve the conflict between the limiting principles adopted by those courts and the "allowance of liberal discovery" (Pet. App. 8a) favored by the Ninth Circuit.

States because, in that context, the relevant question under either approach is the scope of permissible discovery under U.S. law.

Second, discovery should be denied in this case not only because of the practical concerns expressed by the EC, but also because it would be *illogical*, as discussed above, to allow discovery that would be barred (i) in the foreign jurisdiction if the evidence were there and (ii) in the United States if an analogous investigation were pending here. This Court need not await further confirmation from the lower courts on that point of logic before concluding that it would disserve the statutory purpose to allow private parties to exploit section 1782 as a vehicle for circumventing otherwise ubiquitous limitations on pre-litigation civil discovery.

Third, such delay would come at a significant cost, for which there would be no countervailing benefit. As the EC explains (Merits Br. 17), there is "no system for providing [a foreign sovereign] with notice of Section 1782 cases" in the lower federal courts, "much less any regular procedure through which [it] might appear and make those interests known. More important, even if it were feasible for the [foreign sovereign] to appear in every such proceeding, that very notion—that a sovereign government should be obliged to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery—is contrary to principles of comity."

There is no merit to AMD's suggestion that the federal courts are incompetent to discern the civil discovery limitations imposed by foreign jurisdictions—a position that AMD erroneously attributes to the Second Circuit. *See* AMD Br. 28-29. First, the Second Circuit itself has admonished that courts "must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore [they] must often perform" in a great variety of contexts. *Manu Int'l, S.A.* v. *Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981); *see also Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 260 n.29 (1982).[8] Indeed, in the very case upon which AMD relies, the

[8] Adopted in 1966, Rule 44.1 of the Federal Rules of Civil Procedure (and its criminal analogue, Fed. R. Crim. P. 26.1), "substantially changed

Second Circuit reaffirmed that a "'grant of discovery that trenched upon the *clearly established* procedures of a foreign tribunal would not be within section 1782.'" *Euromepa S.A.* v. *R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995) (emphasis in original) (quoting *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985)). And it cannot be more "clearly established" than it is here that discovery would trench upon the discovery policies of the foreign authority, because in this case that authority has filed two briefs adopting precisely that position. Finally, even AMD does not deny that the discoverability of evidence in the foreign jurisdiction is at least *relevant* to a district court's discretion. For that reason, AMD's position, if adopted, would result in greater numbers of opportunistic section 1782 applications rather than fewer inquiries into foreign law.

CONCLUSION

The judgment of the court of appeals should be reversed.

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the manner in which federal courts are to treat questions of foreign law," *Twohy* v. *First Nat'l Bank*, 758 F.2d 1185, 1192 (7th Cir. 1985), such that questions about foreign law should now be "argued and briefed like domestic law." *Sealord Marine Co.* v. *American Bureau of Shipping*, 220 F. Supp. 2d 260, 271 (S.D.N.Y. 2002). The emergence of online legal databases such as Westlaw and Lexis has also made it much easier for federal courts to locate and apply foreign law. *See* Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity*, 50 Cath. U.L. Rev. 591, 628 (2001). For these reasons, adoption of a discoverability rule would not require courts "to master foreign law," for they "need only understand the basic principles of discovery in the relevant foreign system," and they could use the letter rogatory mechanism to resolve uncertainty "[i]n the rare case where this inquiry proves troublesome." *Id.*

Respectfully submitted,

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MARCH 2004

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re: The Application of Ishihara Chemical Co., Ltd., For an order to take discovery of Shipley Company, L.L.C., Pursuant to 28 U.S.C. § 1782	Misc. 99-232 (FB) Declaration of Hans Smit, Stanley H. Fuld Professor of Law, Columbia University

Hans Smit, a member of the Bar of the State of New York, on penalty of perjury, declares as follows:

I. QUALIFICATIONS

1. I am the Stanley H. Fuld Professor of Law and Director of the Center for International Arbitration and Litigation Law at Columbia University.

2. I obtained LL.B. (1946) and LL.M. (1949) degrees, with the highest distinction, from the University of Amsterdam. In 1953, I was a Fulbright Scholar at Columbia University, earning an M.A. degree. I obtained an LL.B. degree from Columbia University in 1958, graduating first in my class. At Columbia, I was designated a James Kent Scholar in all of my years, won various prizes, and was an editor of the Columbia Law Review.

3. In 1960, I joined the Columbia Law School Faculty. Before that time, I had practiced law in leading law firms in The Hague (now de Brauw & Blackstone) and New York (Sullivan & Cromwell).

4. I have, on a number of occasions, been a Visiting Professor of Law at the University of Paris I (Sorbonne), which, in 1990, awarded me an honorary doctorate. I created the Leyden-Amsterdam-Columbia Program in American Law at the University of Leyden and Amsterdam and the

Double Degree Program between Columbia and Paris I. I have been elected a member of The Netherlands Royal Academy of Arts and Sciences and was named a Knight in the Order of The Netherlands Lion by the Queen of The Netherlands. I attach my curriculum vitae as Appendix 1 to this Declaration.

5. At Columbia, I have taught civil procedure, conflict of laws, international law, international arbitration, and international business transactions. I have authored numerous law review articles and books. A summary thereof is attached hereto as Appendix 2.

6. I have acted as an expert on foreign law as well as American foreign relations law and conflict of laws on numerous occasions, in both federal and state courts. I have also acted repeatedly as an expert on American law in foreign and international tribunals. I have extensive experience as an arbitrator in international arbitrations. I am the Editor-in-Chief of The American Review of International Arbitration.

7. In June 1960, I was appointed the Director of the Project on International Procedure at the Columbia Law School. In that capacity, I also acted as the Reporter to the United States Commission and Advisory Committee on International Rules of Judicial Procedure (the "Commission"), bodies created by act of Congress and charged with the task of studying American rules relating to litigation with international aspects and of proposing appropriate legislative reforms. The Project, under a grant made by the Carnegie Corporation, assumed primary responsibility for conducting the appropriate studies and preparing proposed legislative reforms.

8. In my capacity of Reporter to the Commission, I analyzed existing rules, determined their deficiencies, and formulated proposals for reform. After having passed through drafting sessions with members of the Advisory Committee and members of the Advisory Committee of the Columbia Project, these proposals were submitted to the Commission, which, after making such changes as they

deemed appropriate, submitted them to appropriate legislative bodies—to wit, the U.S. Congress, the Commissioners on Uniform State Laws, and the Advisory Committees on Civil and Criminal Rules of Procedure of the Judicial Conference of the United States. All of these proposals are collected in *International Cooperation in Litigation: Europe* (Smit ed., published by M. Nijhoff 1965). I prepared the final versions of the proposals submitted to Congress. I also prepared the explanatory notes accompanying these proposals. All of our proposals were adopted by Congress without change.

9. Among the provisions of which I proposed reform was former Section 1782 of Title 28 of the United States Code. A detailed commentary on this Section was provided in the Explanatory Notes accompanying the version proposed to the Congress and in my articles in 65 Colum. L. Rev. 1015 (1965) and 69 Colum. L. Rev. 1264 (1962).

10. I have prepared this Declaration at the request of Pennie & Edmonds, LLP, counsel for Shipley, L.L.C. [hereinafter "Shipley"]. A copy of my Curriculum Vitae is attached as Appendix 1.

II. FACTS

11. I have reviewed the following documents submitted in this matter:

(a) an *ex parte* application for an order under 28 U.S.C. § 1782, dated October 26, 1999 [hereinafter "Application"];

(b) a memorandum in support of this Application, with a Declaration of Roger S. Thompson, dated October 26, 1999;

(c) this Court's Order, dated April 18, 2000, directing specified discovery; and

(d) a Declaration by Naoki Matsumoto.

III. QUESTIONS

12. I have been requested to address the following questions:

(a) does section 1782 cover the production of the evi-

dence sought,

(b) and, if so, should the Application be rejected in the exercise of the Court's discretion?

IV. OPINION

A. *The Principal Issues That Must Be Addressed*

13. The first question that arises is whether evidence can be obtained pursuant to Section 1782 from a party in the foreign proceeding. In addition, consideration must be given to the various elements of Section 1782. Section 1782 provides for the production of evidence "for use in a proceeding in a foreign ... tribunal." The evidence that can be obtained is "testimony or statement" or "a document or other thing." And, the U.S. court, "may," but is not obligated, to order the discovery. Each of these elements may be relevant in the present context.

B. *Section 1782 Does Not Authorize Obtaining Testimony Or Documents From A Party*

14. The purpose of Section 1782 is to provide American judicial assistance in procuring evidence in the United States from a third party, not from a party, in the foreign proceedings. For assistance is needed only if the person who is to produce the evidence is not subject to the jurisdiction of the foreign or international tribunal. When that person is a party to the foreign proceedings, the foreign or international tribunal can exercise its own jurisdiction to order production of the evidence. But because that foreign tribunal cannot exercise extraterritorial jurisdiction over non-parties in the United States, the assistance of United States courts is needed when the evidence is to be obtained from nonparties.

15. The Second Circuit has ruled that non-discoverability under foreign law does not necessarily preclude discovery in the United States. See *Euromepa S.A.* v. *R. Emersian, Inc.*, 51 F.3d 1095 (2d Cir. 1995); *In re Application of Aldunate*, 3 F. 3d 54 (2d Cir. 1993). This is so because our courts should not be forced to determine discoverability under foreign law when the foreign tribunal can itself

determine whether and to what extent the evidence produced may be used in its proceedings. But this is a question entirely different from whether production of evidence should be ordered in this country when the person that is to produce the evidence is a party in the foreign proceedings.

16. Granting judicial assistance for evidence from a United States company that is a party to a foreign proceeding is likely to be seriously disruptive to the proceeding. The American company would then be subject to the broad discovery that is generally available in the United States that is not available in the foreign tribunal, while his foreign opponent would not be subject to such discovery. In those circumstances, it is appropriate to have only the foreign tribunal determine whether and to what extent evidence can be obtained from the parties before it. To the same effect, see Smit, *American Assistance to Litigation in Foreign and International Tribunals*, 25 Syr. J. Int. L. & C. 1, at 11 (1998).

17. Indeed, even if it were assumed that Section 1782 were available to obtain evidence in the United States from a party in the foreign proceedings, a United States court should exercise its clearly prescribed discretion to deny an application made by the opposing party in the foreign proceedings. As a general rule, it would be improper to impose on a United States court a burden that should reasonably be that of the foreign tribunal. See Smit, *ibid.*

18. Imposing that burden on this Court in the case at hand would be particularly inappropriate, because the Japanese Patent Office has the authority under its own law to direct that Shipley produce testimonial and documentary evidence. See the Declaration of Naoki Matsumoto, paras. 5,6, attached as Exhibit D to Shipley's Memorandum in Support of its Motion. There is therefore no need for burdening this Court with what is within the proper authority and responsibility of the Japanese Patent Office.

C. *Section 1782 Covers Only Evidence Located in the United States*

19. I have earlier defended the view that Section 1782

covers only the production of evidence that is located in the United States. The production of evidence located elsewhere can be ordered only by courts that exercise jurisdiction there. This view was adopted by Judge Paterson of the Southern District of New York in *In re Application of Sarrio S.A.*, 1995 WL 598988. The Second Circuit, per Judge Leval, indicated his agreement with my view by stating that "there is reason to think that Congress intended to reach only evidence located within the United States" (119 F.3d 43 (2d Cir. 1997). Of course, this issue need not be reached if the Application in this case is rejected on the ground that Section 1782 does not authorize the production of evidence by a party to the foreign proceeding. But if this view is not adopted, the view that Section 1782 does not cover production of evidence not located in the United States requires that, in any event, the Application in this case be rejected insofar as it seeks production of evidence not located in the United States.

D. *Is the Japanese Patent Office "A Foreign Tribunal?"*

20. I have consistently defended the view that assistance under Section 1782 is available as long as the evidence sought is to be used in proceedings before a foreign body exercising adjudicatory authority. However, the Second Circuit has given the term "foreign or international tribunal" a much more limited construction. In *In re letters Rogatory Issued by the Director of Inspection of the Government of India*, 936 F. 2d 702 (1991), the Second Circuit, per Judge Friendly, ruled that the Indian Taxing Service, which had the authority to adjudicate tax claims, was not a "foreign tribunal" within the meaning of Section 1782. And in *National Broadcasting Co., Inc.* v. *Bear Steams & Co.*, 165 F.3d 184 (2d Cir. 1999), the Court held that an international arbitral tribunal, although undoubtedly exercising adjudicatory authority, was not a "tribunal" in the sense of Section 1782.

21. Clearly, the Second Circuit rulings are premised on a concern that the district courts not be burdened with providing assistance to other than judicial proceedings similar to their own. District courts do not provide assistance of the

kind here sought to its own Patent Office. The Second Circuit is most likely to regard it as improper to provide assistance to a foreign Patent Office that it does not provide to its United States counterpart.

E. *Is The Evidence Sought "For Use" In A Proceeding?*

22. Moved no doubt again by a desire to limit the burdens imposed on district courts, The Second Circuit has required that the proceedings be pending or imminent. See *In re Request for International Judicial Assistance for the Federal Republic of Brazil*, 936 F.2d 762 (2d Cir. 1991).

23. The documents submitted to me indicate that a substantial part of the evidence sought relates to a patent against which, for more than six months after Ishihara alleged that it would initiate such a proceeding, no proceeding has been instituted, and in fact may never be instituted. Under the Second Circuit's approach, the application, therefore should be rejected.

F. *Section 1782 Does Not Authorize Admission Requests Or Interrogatories*

24. Tellingly, Section 1782 does not mention "admissions" or interrogatories," which, under the Federal Rules, can be obtained only from parties. This confirms that Section 1782 focuses on obtaining evidence from non-parties. For if Section 1782 were intended to allow discovery from parties to a foreign proceeding, it would no doubt have expressly included admission requests and interrogatories.

25. Requests for admissions and interrogatories are not known in Japanese procedure (see the Declaration of Naoki Matsumoto, para. 4), nor, as a rule, in countries of the civil law tradition. It should not be assumed that Section 1782 seeks to introduce into foreign litigation procedural institutions that are unknown to it. Section 1782 should therefore be read as authorizing only what its clear terms convey and as contemplating only the giving of oral testimony or statements.

26. Consequently, the application, to the extent it seeks

admissions and interrogatories, is not authorized by Section 1782, even if it is assumed that Section 1782 authorizes judicial assistance in obtaining evidence from a party in the foreign evidence.

G. *The Court Has, In Any Event, Discretion To Deny The Application*

27. It is well settled that Section 1782, by use of the word "may," gives the court broad discretion in ruling on an application for assistance. The legislative history, the statutory text, the courts, and the commentators are in universal accord. See generally Smit, *International Litigation under the United States Code*, 65 Colum. L. Rev. 1015 (1965); Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S. Code Revisited*, 25 Syr. J. Int. L. & C. 1, 15 (1998). Indeed, the discretionary authority bestowed upon the court has been given specifically to enable it to determine, on a case-by-case basis, whether, and to what extent, it is appropriate to burden the American court with the task of directing the production of evidence to be used in foreign proceedings.

28. In the case at hand, even if the Application otherwise met the requirements of Section 1782, the following circumstances favor this Court's exercising its discretion to deny the Application:

(a) that Shipley is a party in the foreign proceeding and subject to the jurisdiction of that Japanese Patent Office;

(b) that the Japanese Patent Office has the authority to order the production of testimonial and documentary evidence itself;

(c) that the application seeks production of evidence that is not located in the United States and that is to be used in a foreign proceeding that has not been commenced;

(d) that the Japanese Patent Office is not a judicial body;

(e) that the application is clearly overbroad and, indeed, excessive;

(f) that issues of confidentiality and privilege can best be addressed in the foreign forum; and

(g) principles of due process which preclude an ex-party application. See, e.g., *Snaidach* v. *Family Finance Corp.*, 395 U.S. 337 (1960, Smit, 25 Syr. J. of Int. L. & C., at 16 (1998).

V. CONCLUSIONS

29. I therefore conclude that:

(a) no assistance under Section 1782 should be rendered when the evidence is sought from a party in the foreign proceeding;

(b) no assistance under Section 1782 should be rendered when the evidence is not in the United States;

(c) under controlling Second Circuit precedents, no assistance under Section 1782 should be rendered when the foreign proceeding in which the evidence is to be used is not pending or imminent;

(d) under controlling Second Circuit precedents, no assistance should be rendered under Section 1782 when the foreign proceeding is not before a judicial institution or a public body exercising equivalent authority;

(e) Section 1782 does not authorize admission requests and interrogatories;

(f) under Section 1782, this Court has clear discretion to reject the application;

Done, this 18th day of May, 2000

Respectfully Submitted,

/s/

Hans Smit
Stanley H. Fuld Professor
of Law Columbia University

HS:rmp